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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 414

AUSTIN F. McFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 444-456) is reported at 206 F. 2d 872.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1953. (R. 457.) On September 17, 1953, by order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to October 23, 1953. The petition was filed on October 15, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See

also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, where the Government's proof of wilful tax evasion is circumstantial, a court is required to give the jury a specific instruction to acquit the defendant if the proof is not such as to exclude every reasonable hypothesis except that of guilt, over and above the usual instruction on the presumption of innocence and on reasonable doubt.

2. Whether it was error for the trial court to comment, during its instruction to the jury, on the fact that certain primary records were not produced by the defense to contradict the Government's prima facie case.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction

thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 145.)

Criminal Code:

SEC. 3481. *Competency of Accused.*

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.
(18 U.S.C. 3481.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 8, 1951, a two-count indictment was filed against petitioner in the United States District Court for the District of Idaho charging him with violations of Section 145(b) of the Internal Revenue Code. The first count alleged that petitioner filed a false income tax return for the year 1945 in which he stated that his net income was $25,166.67 on which the tax was $10,021.05, whereas he knew that his income was $105,077.90 and that the tax was $71,076.35. The second count alleged a false return for the year 1946 in which petitioner claimed a net income of $39,679.01 and a tax of $18,091.35, whereas the figures should have been $113,748.77 and $74,881.45. (R. 3-4.) After a jury trial petitioner was found guilty as charged, and on May 1, 1952, he was sentenced to eighteen months' imprisonment and a fine of $7,500 on each count. The terms of imprisonment were consecutive, but the second term was suspended and he was placed on probation for two years to follow the term of imprisonment on condition that he pay all income taxes due. (R. 32-33.)

The Evidence.—During the years involved, petitioner derived a major portion of his income from the North Idaho Sales Company, which owned and serviced numerous coin-operated slot machines

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over a wide territory in Idaho.[1] (R. 64-66, 72, 206-207, 295, 298, 334, 338, 347-348, 351-353, 392.) The amounts collected from these machines by petitioner's route men were recorded on receipts of which two carbon copies were made. One of the carbons was left with the owner of the location at which the machine was being operated; the original receipt, the other carbon, and the money collected were turned in to a girl employee in the office of the North Idaho Sales Company. The girl checked the cash against the receipts and deposited the cash in the bank. She then turned the receipts and carbons over to petitioner and did not see them thereafter.[2] (R. 204-209, 296-298, 334-336, 347-349, 355-359, 360-366, 397-399.) The extent of the slot machine business is apparent from the following tabulation of gross income derived from that source as shown on the books of the Sales Company (R. 384):

1942	$169,307.89
1943	173,144.48
1944	140,405.95
1945	191,446.83
1946	246,469.77

Petitioner reported all the income actually recorded in the books of the North Idaho Sales Com-

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[1] He also had income from several taverns, and from rents, dividends and interest. (R. 62-74.) The North Idaho Sales Company, originally a partnership between petitioner and his daughter, was a sole proprietorship during the years involved in this case. (R. 189-190, 254.)

[2] The petition erroneously states (Pet. 8) that only the "third triplicate copy" was turned over to petitioner. (R. 358, 366, 399.)

pany. (R. 70, 76, 167-168.) However, the accountant who prepared the returns did not audit the books, and he did not examine the receipts of the route men. (R. 77-80.) When internal revenue agents began an investigation of the returns for 1945 and 1946, they discovered that petitioner had spent considerably more than his reported income during those years. He told the agents that the source of these expenditures was a cash fund of $50,000 which he had at the close of 1941, and he promised to produce records and a witness. He produced neither; and the witness, when interviewed by the agents, had no information to give. (R. 237-240, 259-272.) The slot machine receipts, although requested, were never furnished to the agents. (R. 260, 399.)

Under the circumstances the Government used the expenditures method to compute petitioner's true net income for 1945 and 1946. It was shown that he had expended large sums, in investments, in loans, in attorneys' fees, and in payment of a Federal District Court fine, which far exceeded his known resources plus his reported income. (R. 218-241.) The computation revealed that for the year 1945 he had a net taxable income of $105,077.90 of which he had reported only $25,166.67, and that for the year 1946 he had a net income of $110,448.77 and reported only $39,679.01. (R. 241-245.) This result was corroborated by a net worth computation. (R. 245-249.)

In order to prove that these 1945-1946 expenditures must have been made from current income,

and could not have come from some cash fund accumulated during prior years, the Government showed that during 1934 and 1935 petitioner was employed as a butcher and lived very economically (R. 150-154, 200-203); that his interest in the slot machine business was very small at that time (R. 200-203); and that, on the basis of the income reported in his returns and his known expenditures for the period from 1936 through 1944, he could not have accumulated much more than $20,000 (R. 188-197, 217-218, 273-279). A thorough examination was made to determine all possible assets and sources of income. (R. 237-240, 259-272.) Even if he had, as he claimed, $50,000 in cash at the end of 1941, that sum would have been exhausted by his expenditures during 1943 and 1944 (R. 256), and he would have needed $150,000 in cash at the end of 1944 to account for all the unexplained expenditures during 1945 and 1946 (R. 257).

Petitioner himself did not take the stand. Some of his witnesses testified that he kept indefinite amounts of cash in safes, which amounts were not recorded in the books. (R. 302-306, 332-333, 394-397.) Another witness testified that petitioner had assets worth over $100,000 in 1943 which the Government had not taken into consideration in its computation.[3] (R. 307-325.) The receipts made out by the slot machine route men were not introduced in evidence.

The Instructions.—Apparently no written re-

[3] The Court of Appeals described the testimony of this witness as "contradictory and highly questionable". (R. 450.)

quest for a specific instruction on the nature of circumstantial evidence was filed at the close of the evidence.[4]

In his charge to the jury (R. 412-426) the trial judge gave the usual instruction that the Government had the burden of proving petitioner guilty beyond a reasonable doubt (R. 415-416). He explained briefly the Government's expenditure and net worth methods of proof (R. 420-421) and said (R. 420)—

> This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation * * *.

Then, after briefly defining the two types of evidence, he said (R. 421)—

> Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

The trial judge also warned the jury during the course of the charge that they should not be influenced by any comment he might have made as to the facts. (R. 425.) A little later, he instructed them that, while the burden of proof never shifted from the Government, they might consider the fail-

[4] Those written requests which actually *were* filed by the defense (R. 38) have not been included in the record.

ure of petitioner to offer any explanation of discrepancies indicated by the Government's proof. (R. 417-418.) During this discussion he called attention to the slot machine receipts and said (R. 417)—

> None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

Just prior to the conclusion of the charge the jury were told that petitioner was not required to prove his innocence, that he was not required to take the stand himself, and that his failure to testify raised no adverse presumption. (R. 422.)

The defense objected to the court's failure to give "the requested instruction that not only must the evidence prove guilt but that it must prove the hypothesis of guilt to the exclusion of all other hypotheses". (R. 424.)

The defense also objected to the court's "comment as to * * * the failure of the defendant to retain the sales slips, or collection slips". The judge recalled the jury and specifically instructed them that they should not be influenced by this comment. (R. 424.)

After the jury had been deliberating for about eight hours, they returned to the courtroom at 8:30 p.m. and the foreman informed the court that they had not yet been able to agree on a verdict. The court asked whether they had any questions and the foreman replied that they would like to hear again the instruction on circumstantial evidence. The court then reread that portion of his original charge in which he had defined the two types of evidence and explained the weight to be given circumstantial evidence. (R. 425-426.) There was no objection.

The record does not reveal how much longer the jury deliberated before it returned with its verdict.

ARGUMENT

1. The evidence that petitioner wilfully evaded payment of his income taxes was circumstantial. The trial court instructed the jury on the presumption of innocence, reasonable doubt, and the general nature of circumstantial evidence, but refused to add a formula to the effect that, for circumstantial evidence to be sufficient to sustain a verdict of guilty, it must be such as to exclude every hypothesis other than that of guilt. Petitioner contends (Pet. 10-13) that the Courts of Appeals in some circuits hold that such an instruction is required.

In the first place, the original charge actually contained the substance of the desired instruction in language closely keyed to the facts of the present case. While explaining to the jury the Govern-

ment's use of the expenditure and net worth methods to prove unreported income, the one critical issue in the case, the court said (R. 420):

> This is in the nature of circumstantial evidence. Therefore, you should consider *whether or not the Government has precluded every reasonable source* of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation * * *. [Emphasis supplied.]

The Court of Appeals correctly said (R. 454) that the instruction given stated the law "with much more clarity and force" than the abstract objection made by petitioner at the close of the charge (*supra*, p. 9).

Furthermore, there is no present conflict of decisions calling for a review by this Court. Many of the cases cited in the petition are not in point, for they deal, not with instructions to the jury, but with the quantum of circumstantial evidence required to take the case to the jury or to sustain the verdict.[5] Obviously, the various formulae used by appellate courts in defining and redefining this concept need not necessarily be used in instructing the jury. In pointing out this distinction, the

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[5] In this class are *Bryan* v. *United States*, 175 F. 2d 223, 226 (C.A. 5th); *Strickland* v. *United States*, 155 F. 2d 167, 168 (C.A. 5th); *Thompson* v. *United States*, 145 F. 2d 826 (C.A. 5th), certiorari denied, 324 U.S. 861; *Epstein* v. *United States*, 174 F. 2d 754, 769 (C.A. 6th); *United States* v. *Fenwick*, 177 F. 2d 488, 490 (C.A. 7th); cf. *United States* v. *Dolasco*, 184 F. 2d 746, 748 (C.A. 3d).

Court of Appeals for the Ninth Circuit said in another recent case (*McCoy* v. *United States*, 169 F. 2d 776, 786, certiorari denied, 335 U. S. 898):

> Of course, the jury's conclusion must have support in the evidence to the effect that there is no hypothesis determinable from the proof under which the verdict of guilt could reasonably be avoided, but this is not saying that any technical form of instruction need be given.

A different formula from that requested by petitioner, namely, that the jury should acquit if the circumstances are as consistent with innocence as with guilt, has been discussed in several cases. In the old case of *Garst* v. *United States*, 180 Fed. 339, 343, never since cited with approval, the Fourth Circuit held that such an instruction should be given. A dictum to the same effect in *Gurera* v. *United States*, 40 F. 2d 338, 340 (C.A. 8th), has likewise never been cited with approval. In *McLendon* v. *United States*, 13 F. 2d 777, 779, the Sixth Circuit held that the usual instruction on the presumption of innocence and reasonable doubt was sufficient, although it was better practice to tell the jury that they should acquit the defendant if the circumstances were as consistent with innocence as with guilt and did not exclude every other reasonable hypothesis but that of guilt.[6]

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[6] The court relied on *Hendrey* v. *United States*, 233 Fed. 5, 18 (C.A. 6th), which in turn relied on *Harrison* v. *United States*, 200 Fed. 662, 664 (C.A. 6th), a case involving the sufficiency of the evidence.

The only cases which we have been able to find which clearly require a specific instruction that circumstantial evidence must be such as to preclude every other reasonable hypothesis except that of guilt are two old cases in the Fifth Circuit. These are *Anderson* v. *United States*, 30 F. 2d 485, and *Stutz* v. *United States*, 47 F. 2d 1029. Neither has ever been cited with approval.

All recent federal authority clearly holds that it suffices in all cases to charge the jury on the presumption of innocence and reasonable doubt, and that it is simply confusing to indicate that some different degree of proof is required in a case in which the evidence of guilt is wholly circumstantial.[7] Judge Learned Hand first called attention to this in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C.A. 2), certiorari denied, 279 U.S. 863, and a few years later the same jurist criticized the *Garst*, *Anderson* and *Stutz* cases in the following language (*United States* v. *Becker*, 62 F. 2d 1007, 1010 (C.A. 2d)):

> The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do inferences from events. A jury tests a witness's

[7] For the confusion in state court decisions see Randall, *Instructions to Juries*, Sections 226-235, 1983; Branson, *Instructions to Juries* (3rd ed., 1936), Sections 65-66, 3327; Note, 89 A.L.R. 1379.

> credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it. All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual, or to articulate it for different situations, is more likely to impede, than to promote, their inquiry.

So far as we have been able to determine all recent federal decisions have followed this view.[8] See *Corbett* v. *United States*, 89 F. 2d 124, 128 (C.A. 8th); *Stryker* v. *United States*, 95 F. 2d 601, 604 (C.A. 10th); *United States* v. *Valenti*, 134 F. 2d 362, 364 (C.A. 2d), certiorari denied, 319 U.S. 761; *United States* v. *Spagnuolo*, 168 F. 2d 768, 770 (C.A. 2d), certiorari denied, 335 U.S. 824; *McCoy* v. *United States*, 169 F. 2d 776, 784-786 (C.A. 9th), certiorari denied, 335 U. S. 898; *Samuel* v. *United States*, 169 F. 2d 787, 791 (C.A. 9th); *Himmelfarb* v. *United States*, 175 F. 2d 924, 942 (C.A. 9th), certiorari denied, 338 U.S. 860; *United States* v. *Kemble*, 197 F. 2d 316, 320 (C.A. 3d); cf. *United*

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[8] The *Banks* case, cited by petitioner, is not to the contrary. The court simply said that the defendant was given the instruction he had requested. *Banks* v. *United States*, 204 F. 2d 666, 672-673 (C.A. 8th), certiorari denied October 19, 1953.

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States v. *Dolasco,* 184 F. 2d 746, 748 (C.A. 3d); *United States* v. *Augustine,* 189 F. 2d 587, 591 (C.A. 3d). Eminent text writers have offered the same criticism of the specific instruction desired by petitioner. See I and IX Wigmore, *Evidence* (3rd ed., 1940), Secs. 25-26, 2497; II Wharton, *Criminal Evidence* (11th ed., 1935), Sec. 926. And the Fifth Circuit itself tacitly abandoned its earlier holding and quoted from the *Austin-Bagley Corp.* case with approval in *Beckman* v. *United States,* 96 F. 2d 15.

In addition, petitioner apparently did not file a written request for such an instruction at the close of the evidence as required by the provisions of Rule 30 (*supra,* p. 3). The record does not contain the requested instructions, and the petition does not state that a written request was submitted on this point. The charge was, therefore, not "appropriately invoked". *Bruno* v. *United States,* 308 U.S. 287, 293; *Goldsby* v. *United States,* 160 U.S. 70, 77; *Schuermann* v. *United States,* 174 F. 2d 397, 400-402 (C.A. 8th), certiorari denied, 338 U.S. 831.

Petitioner complains (Pet. 14-16) that the supplemental instruction on circumstantial evidence, given at the jury's request after they had been deliberating for some time, likewise failed to include the formula he desired, and, in addition, made no mention of reasonable doubt. But petitioner did not, as required by Rule 30, call the trial court's attention to any supposed deficiency in the supple-

mental instruction. As has been shown, it was unnecessary to include his specific formula. The jury had been carefully instructed on reasonable doubt during the course of the original charge, and if petitioner felt that the effect of this was weakened by the supplemental charge he could easily have obtained clarification. We think, however, there was clearly nothing in the supplemental charge to indicate to the jury that they could convict petitioner if they had a reasonable doubt of his guilt.[9]

2. Petitioner contends (Pet. 16-18) that the trial court's comment to the jury on the failure of the defense to produce the receipts of the slot machine route men was, in effect, an instruction that it was incumbent on him to take the stand and produce the slips. This contention also is plainly without merit.

The prosecution had presented a clear prima facie case that petitioner had unreported income from some source during the years in question, and it had shown that the original records of the route men had not been made available to the agents during their investigation despite the fact that they had been requested. Production of the slips might have negated the slot machine business as the source of the unreported income, yet several of petitioner's route men and office girls testified in his behalf without producing them. The trial judge pointed out this patent fact. He also twice cau-

[9] There is nothing in the record to indicate whether the jury returned with their verdict shortly after receiving the charge or deliberated far into the night.

tioned the jury that they were not bound by his comments on the evidence; he instructed them that the burden of proof rested with the Government and never shifted to petitioner; and he specifically warned them that petitioner's failure to take the stand raised no adverse presumption. (*Supra*, pp. 8-9.)

The comment on the slot machine receipts was justified by the facts. The right of a federal trial judge to comment on the evidence is unquestioned,[10] and he may point out the failure of a taxpayer to offer any explanation for discrepancies between his returns and his actual income as indicated by the Government's proof.[11] "[The judge] is free, not only to give his impressions of the witnesses, but to point out the rational implications of the evidence, * * *." *United States* v. *Frankel*, 65 F. 2d 285, 288 (C.A. 2d), certiorari denied, 290 U.S. 682. Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[12] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[13] there was no error in the present instruction. Though a jury may not consider the failure of a defendant to take the stand,

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[10] *Quercia* v. *United States*, 289 U. S. 466, 469; *Glasser* v. *United States*, 315 U. S. 60, 82.

[11] Cf. *Bell* v. *United States*, 185 F. 2d 302, 309 (C.A. 4th), certiorari denied, 340 U. S. 930.

[12] *Wilson* v. *United States*, 162 U. S. 613, 619.

[13] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.); cf. *United States* v. *Fleischman*, 339 U. S. 349, 360-364; *Rossi* v. *United States*, 289 U. S. 89, 91-92.

it may consider the failure of the defense to counter the strength of the Government's case. "If the accused happens to be the only repository of the facts necessary to negative the presumption arising from [the Government's case], that is a misfortune * * * which is inherent in the case." *Yee Hem* v. *United States, supra,* 268 U.S. 178, 185.

The decision of the Court of Appeals is not in conflict with *Wilson* v. *United States,* 149 U.S. 60, or *Bruno* v. *United States,* 308 U.S. 287. In those cases the reference was specifically to the failure of the defendant to take the stand, not to the failure of the defense.

CONCLUSION

The decision of the Court of Appeals is clearly correct and no conflict of decisions exists. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1953

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